

# Overview of the 2006 Amendments to the Federal Rules of Civil Procedure Governing E-Discovery

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### **Overview**

#### **2006 E-Discovery Amendments**

- Meet and Confer Requirements of Rules 16 and 26
- The Inclusion of ESI in Rules 26(a), 33(d), 34(a), and 34(b)
- Forms of Production and Metadata Under Rule 34(b)
- Return of Privileged Information Under Rule 26(b)(5)(B)
- Preservation and Production of Data That Is "Not Reasonably Accessible" Under Rule 26(b)(2)(B)
- Safe Harbor for Routine Destruction of Data Under Rule 37

### **Rule-Making Process**

### **Advisory Committee on Civil Rules**

- Members
  - 2 Appellate Judges, 3 District Judges, 1 State Court Judge, and 1 Magistrate Judge
  - 1-2 Professors
  - 3-4 Practicing Lawyers
  - Reporter
  - Special Reporter

#### Process

- 1. Conferences By Invitation
- 2. Public Written Comments
- 3. Public Hearings

## **Rule Approval Process**

- Advisory Committee on Civil Rules
- Standing Committee on Rules
- Judicial Conference of the United States
  - 1. Chief Judge of Each Circuit
  - 2. One District Judge per Circuit
- United States Supreme Court
- United States Congress

# The Challenge of the Digital Age

# Information Today Resides Predominantly in Electronic Form:

- ➤ 92% of All Information Is Generated in Digital Form
- ➤ Most Electronic Records Are Never Reduced to Hard Copy

### **Justification for the New Rules**

- Volume Is Staggering
  - A single CD-ROM = 325,000 typewritten pages
  - A terabyte of backup = 500 million pages
  - 50 e-mails per day x 100,000 employees = 1.5 billion e-mails annually
- Data Is Dynamic
- 3. ESI Is Difficult to Delete
- 4. Data May Require Retrieval, Restoration, or Translation

### Rule 26(f) Checklist

- 1) Become Familiar with Client's IT Systems
- 2) Identify the Sources on Which ESI Is Located and the Kinds of Data Stored
- 3) Identify the Custodians and Key Players in ESI Systems
- 4) Determine What Steps Have Been Taken to Preserve ESI
- 5) Determine the Scope of Searches for Relevant ESI

# Rule 26(f) Checklist (Continued)

- 6) Determine the Form Production Will Take
- 7) Determine Whether ESI Will Raise Privacy Concerns
- 8) Consider a "Quick Peek" or "Clawback" Agreement to Prevent Inadvertent Waiver
- 9) Determine If Some Relevant Data Is Not Reasonably Accessible and Consider Cost-Shifting Arrangements If an Adversary Still Seeks that Data
- 10) Identify Any Local Rules Governing E-Discovery
- 11) Obtain Information About Your Opponent's ESI

### **Sources of Data**

- Databases
- Network servers
- Computer systems
- Backup and Archival Media
  - > Tapes
  - Discs
  - Drives
  - Cartridges
- > Removable Media

- Desktop Computers
- > Laptop Computers
- > Handheld Devices
  - > PDAs
  - Mobile Telephones
  - Pagers
- Audio Systems
  - ➤ Voicemail
- ➤ Legacy Systems (Hardware & Software)

### **Data**

- > E-mail (with Attachments)
- Word Processing Documents
- **≻**Spreadsheets
- ➤ Presentations (PowerPoint Slides)
- **≻**Graphics
- **Animations**
- **≻**Images
- ➤ Audiovisual Recordings
- ➤ Voicemail Messages

# The Duty to Preserve

#### **Not Addressed by the Rules**

# Rowe v. Albertsons, Inc., 166 Fed. Appx. 171, 174 (10th Cir. 2004)

The duty attaches when "litigation is more than merely an abstract possibility or unwarranted fear. The underlying inquiry is whether it was reasonable for the investigating party to anticipate litigation and prepare accordingly."

# Cache La Poudre Feeds, LLC v. Land O Lakes Inc., 244 F.R.D. 614 (D. Colo. 2007)

A demand letter seeking a negotiated resolution and making no mention of the preservation of evidence is insufficient to trigger a duty to preserve.

### **Preservation Orders**

# When Should a Court Issue a Preservation Order?

- (1) When a court is concerned that the evidence may disappear.
- (2) When the party seeking the order will be irreparably harmed if the evidence disappears.

Preservation orders should be narrowly tailored, and ex parte orders should only be issued in exceptional circumstances.

# Possession, Custody, or Control

# **Six Categories Not to Forget**

- 1) Current & Archived Records
- Records of Current and Former Employees (sometimes including business-related e-mail sent from personal e-mail accounts)
- 3) Records Maintained by Parents or Subsidiaries
- 4) Records of Acquired Companies & Spin-offs
- 5) Records of Bankrupt Entities that May Have Migrated
- 6) Records in a Party's "Control" (Even Off-Site)

# 26(f) Conference (I): Preservation Issues

### **Litigation Hold Notice Privileged:**

- Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers LLP, 2006
   WL 1520227 (S.D.N.Y. June 1, 2006)
- Turner v. Resort Condos. Int'l, LLC, 2006 WL 1990379 (S.D. Ind. July 13, 2006)
- Gibson v. Ford Motor Co., 510 F. Supp. 2d 1116 (N.D. Ga. 2007)
- Capitano v. Ford Motor Co., 831 N.Y.S.2d 687 (Sup. Ct. Chautauqua Co. 2007).

### <u>Information from Hold Notice Not Privileged</u>:

- In re eBay Seller Antitrust Lit., 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007).
- Wells v. Xpedx, 2007 WL 1200955 (M.D. Fla. Apr. 23, 2007).
- In re Grand Jury Investigation, 445 F.3d 266 (3d Cir. 2006).

# 26(f) Conference (II): Discovery of ESI

- Catch-all provision concerning all aspects of discovery of ESI including — inter alia accessibility, cost-shifting, proportionality, and search methodology.
- Importance of Early Discovery from Persons with Knowledge of ESI Systems Via Deposition, Interrogatories, or Questionnaires.

# 26(f) Conference (III): Forms of Production

- Paper v. Electronic
- Electronic Formats: Native, TIFF, PDF
- Searchable v. Page Images
- With or Without Metadata

### Note on Metadata

- Systems Metadata
- Substantive Metadata
- Embedded Metadata

### 26(f) Conference (IV): Information Retrieval

- Clawback: Privileged Documents Inadvertently Produced Will Be Returned Without Waiver
- Quick Peek: Requesting Party May Look at Documents Prior to Privilege Review To Determine the Scope of the Request

Clawback Agreements Will Not Protect Against Waiver Claims by Non-Parties

Privilege Agreements May Only Provide Protection When Production Is Compelled by the Court. *See Hopson v. Mayor & City Counsel of Baltimore*, 232 F.R.D. 229 (D. Md. 2005).

## Rule 16(b) Scheduling and Planning

The scheduling order may also include:

(iii) Provisions for disclosure or discovery of ESI

(iv) Any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced

# 26(f) Conference: Open Questions

- 1) How Much Should Be Accomplished at the Initial Conference?
- 2) Can Parties Agree on Preservation & Destruction?
- 3) Can Parties Agree on Sampling?
- 4) Can Parties Agree About Metadata?
- 5) Should Parties Bring Technical Consultants?